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3 August 2010

Ms Christine McDonald
Committee Secretary
Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email: fpa.sen@aph.gov.au

Dear Ms McDonald

ALRC – PRIVACY REFORM – RECOMMENDATIONS – DRAFT APPs

The Australian Finance Conference (AFC), the national finance industry association, has greatly appreciated the opportunity to participate in the extensive privacy reform process including through our submissions and stakeholder discussions with the Australian Law Reform Commission (ALRC) and the Government in its response to the reform recommendations contained in the ALRC Report: "*For Your Information: Australian Privacy Law & Practice*".

We also welcome the ability to continue this involvement through the invitation provided by the Committee to comment on the first tranche of the implementation of these reforms: the *Exposure Draft of the Australian Privacy Principles* (the draft APPs) and the extension granted to enable us to make this submission.

By way of background, AFC member companies (a current list accompanies) provide the full range of financial services from personal and housing credit, to leasing and equipment financing, factoring, wholesale bailment, and commercial loans to small and medium-sized businesses; funds are raised via deposits or debentures from the public and from the capital markets; Members deal directly with their customers as well as through intermediaries. AFC Members have a long experience in balancing the competing policy tensions within the credit area: privacy, responsible and non-discriminatory lending and financial inclusion.

While reform of the credit reporting provisions (tranche 2) is the principal focus of AFC members, we understand that, as with the current law, the general information handling principles set out in the draft APPs will operate as the broad foundation of compliance for this sub-set of personal information. We therefore recognise the importance of raising areas of potential concern for AFC members that have been identified in the APPs as currently drafted for consideration by the Committee.

Our submission consists of two parts: general comments follow and more specific discussion is contained in the attachment. In compiling our comments we have taken into account the extensive consultation which has occurred to-date on the privacy reforms which has culminated in the release of the draft APPs; and also their impact on both the public and private sectors. We have also reviewed the draft in the context of the reform goals (as

identified in the Companion Guide) and, in particular, to achieve streamlined and harmonised law that is more consistent and less complex than the current framework. We have endeavoured to take into account the broader reform impacts (eg including the credit reporting provisions and the proposed enhancements of the functions and powers of the regulator) but note the difficulty in the absence of draft legislation covering these matters. We would therefore appreciate the opportunity to revisit our comments or to raise any additional issues with the draft APPs, if required, following the release of other tranches or stages of the reformed law.

Key outcomes that the Government has identified and AFC Members equally support, as underlying the draft APPs are:

- High level principles that are technologically neutral, simple, clear and easy to understand and apply;
- Principles that impose reasonable obligations on entities and allow them to tailor personal information handling practices to their diverse needs and business models, and the equally diverse needs of their clients.
- Principles that appropriately balance the interest of the public and the individual interests – both in terms of efficient and effective service delivery and the risk of harm from inappropriate handling of an individual's personal information.

Generally the APPs as drafted in the Exposure Legislation achieve these outcomes and we commend this result. However, there are a range of areas where, in our view, the objectives have failed on particular components of the current draft of the principles and we have identified these against the relevant principle in the attached.

We would be happy to discuss these further or provide additional information. Please feel free to contact me (ron@afc.asn.au) or our Corporate Lawyer, Helen Gordon, (helen@afc.asn.au) or both via 02 9231 5877.

Kind regards.

Yours truly,

Ron Hardaker
Executive Director

AFC SUBMISSION – EXPOSURE DRAFT APPs

PROVISION	ISSUE	AFC COMMENTS
s. 15	Definition of Australian Law	We note the proposed inclusion of a definition to clarify the current generic reference to "law" used (eg in the NPPs) and qualification to laws of Australia. We note that the definition is narrow in the global context within which AFC Members operate and potential need to comply with law beyond the Australian borders. However, we also note the intention to replicate the policy (currently reflected in Privacy Act s. 6A(4) and s. 13D) of removing the risk of breach allegation if the act or practice is required by an applicable law of a foreign country in the reformed law (noted at Companion Guide pg 7). **AFC Comment:** • We support the proposed inclusion of a provision in the reformed law to reflect the current policy relating to acts or practices required or authorised by foreign law.
APP 1 s. 2(4)	Privacy Policy Contents	We understand that a key objective of the reform is to set high level principles that enable entities to structure compliance appropriately. The prescriptive approach of mandating the contents for inclusion in a Privacy Policy set out in draft APP 1 (at s. 2(4)) would appear to be at odds with this objective. At present, details of contents of Privacy Policies have been dealt with as a matter of Guidance by the Privacy Commissioner rather than prescribed in the relevant principle. We submit that this is the better approach to achieve the reform objectives. **AFC Recommendation:** • Omit s. 2(4) from APP 1 and leave guidance on content of Privacy Policies as a matter for the Australian Information Commissioner (the regulator).
APP 3 s. 4(1) s. 4(2)(a)(i)	Collection - **Reasonably** necessary, or **directly** related to,....	We note and support the proposed inclusion of the term "reasonably" necessary in the general approach to the collection principle. In our view, it reflects a compliance framework that appropriately balances privacy and public interest rights (including the efficient and effective delivery of services); a key goal of the reform. However, we also note the proposed inclusion of a further element of the collection principle namely, that the information collection can be justified

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		as – directly related to – the entity's functions and activities. This element would not appear to have been recommended by the ALRC. Also, the Companion Guide does not appear to provide a policy explanation for its inclusion. We submit that the inclusion of the qualification "directly" adds an unnecessarily prescriptive aspect to this component of the principle and is at odds with Government's objective of a high-level, non-prescriptive approach and an appropriate balance between the interests of the individual and the public. In our view, removal of the qualification, so that the collection is "reasonably necessary, or related to, the entity's functions or activities" would achieve an appropriate level of privacy protection without adding a further compliance issue for an entity. Questions of the degree of relatedness are better left as a consideration of use and disclosure in the context of primary and secondary purposes of collection rather than a benchmark for determining whether collection is permissible or not. **AFC Recommendation:** • Omit the qualification of "directly" from APP 3 s4(1) to better achieve reform objectives.
APP 3 s. 4(5)	Collection from third party – permission for agency if authorised / required by law	We note that an agency is permitted to collect from a third party if required or authorised by law. We are not aware of the policy justification for confining the permitted means of collection to include third parties to the public sector. We submit, that this could equally be relevant to private sector organisations. **AFC Recommendation:** Remove qualification ïf the entity is an agency" – to permit entities broadly to collect from a third party if authorised or required by law.
APP 4 (& APP 3 s4(6))	Unsolicited personal information	We submit that APP 4 is not necessary and potentially devalues the Government's reform objectives. While currently, unsolicited personal information is not specifically covered in the Privacy Act and that the relevant NPP for private sector entities does not distinguish information handling on the basis of handling, as a matter of industry practice, we understand that unsolicited information is generally dealt with as if it were solicited personal information. The trigger for compliance appears to be inclusion in a record (or generally available publication). In brief, if an entity wishes to use or disclose unsolicited personal information that it has included in a record, it is subject to the

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		current principles (eg NPP 2). We understand the inclusion of APP 4 reflects the Government's acceptance of the ALRC recommendation that personal information that is received by an agency or organisation should still be afforded privacy protections, even where the agency or organisation has done nothing to solicit the information and encouragement that information should be collected directly from the individual where reasonable. However, in our view, unlike the UPP proposed by the ALRC, what has been proposed by the Government in APP 4 requires a sophisticated compliance approach that is, in our view, unwarranted. The Government's aims could equally be achieved by the proposed ALRC UPP 2.4 – with minimal compliance process and consequently cost. **AFC Recommendation:** • APP 4 should be omitted and replaced with the ALRC proposed UPP 2.4. As is currently the case, the compliance trigger should turn on whether the information has been included in a record or generally available publication.
APP 5 S 6(2)(b)	Notification - Collection from a third party	We submit that, in line with the intended objective of the notification obligations imposed on an entity when collecting from a third party (under APP 5 s. 6(2)(b)) the alternates contained in (i) and (ii) should be cumulative rather than alternative and the word "or" should be replaced with "and". The effect would be, again subject to the general reasonableness test, obligations to notify would only arise when an entity collects from a third party when the individual was not aware of the collection. **AFC Recommendation**: • In APP s. 6(2)(b) replace the word "or" between (i) and (ii) with "and".
APP 5 s.6(2)(c)	Notification – authorised / required by law	We are concerned that it has been proposed to include in APP 5 s.6(2)(c) a notification requirement to include the **name** of the Australian law etc which requires or authorises collection. AFC members and others that operate in the financial services sector have a significant range of laws which may provide a permitted basis for collection of personal information. These laws have been the subject of significant reform, particular in the last few years; reform that has included renaming. In our view, the obligation to notify the name of the law etc imposes a compliance obligation at odds with the Government's reform objectives. In this regard, we note that the compliance obligation to notify the matters listed under APP 5 s6(2) (and therefore included s. 6(2)(c) are tempered by the general requirements (contained in s. 6(1)); which contain a test of

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		reasonableness and the adoption of means other than notification to ensure the individual's awareness of the collection matters. For example, if the collection is authorised or required by law, an entity would only be required to take such steps (if any) that are reasonable in the circumstances. As noted earlier, given the range of relevant laws for AFC members, it may not be reasonable in the circumstances for the entity to have to name the specific law that requires / authorises collection. However, in our view, it would be preferable that this was clear through the removal of the prescriptive requirement to name the law as currently proposed in s. 6(2)(c). We are also concerned about the range of regulation that imposes a disclosure obligation on AFC members and others in the industry and the overwhelming task of presenting it for individual's to be able to comprehend its contents. The Government has encouraged industry to adopt as simple yet comprehensive approach to these disclosures to minimise the amount of documentation that is provided to individuals in compliance with these obligations. A requirement to include the detail proposed in s. 6(2)(c) would appear to be at odds with this. **AFC Recommendation:** • In line with the Government's proposed reform objectives including high-level principles, omit from APP 5 s. 6(2)(c) the requirement to name the law etc that authorises or requires collection.
APP 5 s. 6(2)(d)	Notification – naming of country of foreign recipient	Accepting the qualification of this requirement by the tests of reasonableness and practicability – we submit that the specificity of requiring the naming of the country of a proposed foreign recipient imposes a higher compliance obligation than could be adopted to achieve the Government's reform objectives. **AFC Recommendation:** • In line with the Government's proposed reform objectives including high-level principles, omit from APP 5 s. 6(2)(d) the requirement to specify the country of location of the foreign recipient.
APP 7 s. 8(2)	Permitted use or disclosure of personal information collected from individual for direct marketing	We note that no specific consent provision has been included in APP 7 s. 8(2)(c). We understand that an entity that has obtained the individual's consent should be able to rely on the more general permission contained in s. 8 (2)(b); namely, that the consented to use / disclosure was within the reasonable expectation of the individual. However, we suggest that a specific permission to allow use / disclosure for direct marketing with the individual's consent, in addition to a separate permission relying on the reasonable expectations of the individual, would assist with compliance certainty. **AFC Suggestion:** • Include a specific permission to allow use / disclosure of personal

PROVISION	ISSUE	AFC COMMENTS
		information obtained from the individual with the consent of the individual. •
APP 7 s. 8(3)(a)	Permitted use or disclosure for direct marketing when information collected from a third party	We note an apparent anomaly in the current drafting of this provision. We query how an individual would not reasonably expect the organisation to use / disclose personal information for direct marketing (s. 8(3)(a)(i) if the individual had consented to the use / disclosure (s. 8(3)(b)(i)). **AFC Suggestion:** • We suggest consideration be given to possible re-drafting of this provision.
APP 7 s. 8(6)	Interaction with other legislation	We note and support the clarification of the direct marketing principle (APP 7) with other legislation that regulates direct marketing. We suggest that the anti-hawking provisions within the Corporations Act are a further area of existing regulation that needs to have the interaction clarified. We note the inclusion of a regulation-making power to deal with this and other possible Commonwealth Acts. **AFC Suggestion:** • However, in the interests of compliance certainty we suggest it may be appropriate to specifically include those provisions within the list in addition to the DNCR Act and Spam Act.
APP 8 s. 9(1) + ss 19 & 20	Cross Border Disclosure	We note the broad overview provided in the Companion Guide to assist understanding with the interpretation of APP 8. As we understand, in broad terms, before the proposed disclosure cross border, provided an entity has taken reasonable steps to ensure that the foreign recipient does not breach the APPs in its handling of personal information (eg via a contract between the entity and the recipient requiring the compliance by the recipient with the APPs), it is not prevented from disclosing the information (ie s. 9(1)). However, regardless of where the contractual responsibility rests, the entity remains liable for any breach in compliance with the APPs of the foreign entity (s. 20). However, the entity is permitted to disclose to the foreign entity even if it has not taken the steps contained in s. 9(1) in the circumstances specified in s. 9(2) – eg the entity reasonably believes that the foreign recipient is bound in its information handling by laws etc substantially similar to the APPs and the individual can take enforcement action. If the entity discloses under s. 9(2) – it will not be liable for any breach in compliance, liability rests with the foreign entity. In this regard we note that the individual's consent alone will not be

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		enough to permit cross-border disclosure. Further action is required by the entity as a pre-cursor to obtaining the consent; namely the entity is required to expressly inform the individual that, should the individual consent, the entity is not required to take reasonable steps to ensure the foreign recipient handles the information in accordance with the APP standard. We note that the approach adopted in APP 8, though reflecting the Government's response, is substantially different to what was recommended by the ALRC and from the current NPP 9 principle. We submit that as a matter of policy and drafting it fails to achieve the key objectives (eg high-level principles, simple, clear and easy to understand and apply) of the reforms. It also shifts the risk balance heavily to the entity and we query the individual interest justification to support that. In this regard, we note global developments that have occurred since release of the exposure draft, in particular, Australia's commitment to the APEC Cross-border Privacy Enforcement Arrangement (CPEA) which will effectively assist to remove country boundaries in the enforcement of privacy protections and query the need for the approach adopted in APP 9. **AFC Recommendation:** We recommend that APP 9 be re-drafted to better achieve the underlying policy objectives of the reform. An approach similar to the proposed ALRC UPP 11 may better achieve these aims.

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AFC MEMBER COMPANIES

Advantedge Financial Services
Advance Business Finance
Alleasing
American Express
Automotive Financial Services
Bank of Queensland
BMW Australia Finance
Capital Finance Australia
Caterpillar Financial Australia
Centrepoint Alliance
CIT Group
Citi Australia
CNH Capital
Collection House
Commonwealth Bank of Australia
Credit Corp Group
De Lage Landen
Dun & Bradstreet
Enterprise Finance Solutions
Esanda
FlexiGroup
Ford Credit
GE Capital
Genworth Financial
GMAC
HP Financial Services
HSBC Bank
Indigenous Business Australia
Institute of Mercantile Agents
International Acceptance
John Deere Credit
Key Equipment Finance
Komatsu Corporate Finance
Leasewise Australia
Liberty Financial
Lombard Finance
Macquarie Equipment Rentals
Macquarie Leasing
Max Recovery Australia
Mercedes-Benz Financial Services
Nissan Financial Services
Once Australia t/as My Buy
PACCAR Financial
Provident Capital
Profinance
RABO Equipment Finance
RAC Finance
RACV Finance
Resimac Limited
Retail Ease
Ricoh Finance
RR Australia
Service Finance Corporation
Sharp Finance
SME Commercial Finance
Solar Financial Solutions
St. George Bank
Suncorp
Suttons Motors Finance
The Leasing Centre
The Rock Building Society
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